No. 13,005

IN THE

United States Court of Appeals

For the Ninth Circuit

MINER LII and ALICE LII,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANTS.

O. P. SOARES,
Union Trust Building, Honolulu, Hawaii,
Attorney for Appellants.

Subject Index

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judgment made and entered May 31, 1951 (R. pp. 11-13). Notice of appeal therefrom was filed May 31, 1951 (R. p. 14). The appeal was timely. Rule 37(a), Federal Rules of Criminal Procedure, jurisdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C., Judiciary and Judicial Procedure, Sections 1291, 1294.

II.

STATEMENT OF THE CASE.

Miner Lii and Alice Lii, husband and wife, and appellants herein, were jointly indicted by the grand jury on March 14, 1951, for violation of Section 2421, Title 18, United States Code. The indictment charges that on or about October 9, 1950, defendants purchased a ticket from the office of Pan American World Airways in San Francisco, California, to be used by one Sarah Lee Wright in interstate travel from San Francisco, California, to the city and county of Honolulu, Territory of Hawaii, for the purpose of practicing prostitution in Honolulu, and that such ticket was so used by Sarah Lee Wright for the aforesaid purpose.

The defendants were tried jointly and were both convicted.

The questions involved in the appeal relate to (a) whether the Court's action in ordering defendants into custody of the United States Marshal in the presence of the jury prevented defendants from ob-

taining a fair trial; (b) the admission of certain evidence on behalf of the prosecution relating to events which happened after the alleged crime was complete, to which objection was duly taken; (c) the Court allowing the prosecution to ask leading questions, and questions immaterial but prejudicial to defendants, over objections; (d) the action of the Court in allowing the prosecutrix to remain in Court, although the jury was excluded, while defendants-appellants made an offer of proof of facts to be elicited from the prosecutrix on cross-examination; (e) the action of the Court in limiting the scope and extent of the cross-examination of the prosecutrix and of commenting on her cross-examination in a manner unfavorable and prejudicial to defendants-appellants; (f) the refusal of the Court to allow defendants-appellants on cross-examination of a government witness to fully inquire into the character and criminal activities of the witness; (g) the Court's adverse ruling upon defendants-appellants' motion for a directed verdict as to defendant Miner Lii; (h) the Court's refusal to permit defendants-appellants to elicit corroboration of testimony contradicting previous testimony of prosecutrix; (i) the action of the Court in allowing cross-examination of defendant Alice Lii on matters not referred to in her direct testimony; (j) the action of the Court in permitting improper questions of witnesses called in rebuttal; (k) the Court's refusal to allow defendants-appellants a reasonable continuance in order to procure a witness whose testimony was made necessary by testimony adduced by the prosecu-

tion on its case in rebuttal and in allowing prosecution, on rebuttal, to adduce evidence of other crimes allegedly committed by defendants but not related to the crime alleged in the indictment.

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Court erred in overruling defendants' objection to trial by that jury in front of which they had been found guilty of contempt, fined and placed in custody of the United States Marshal.

2. The Court erred in permitting evidence of the action of the prosecutrix and of the defendants after their arrival in Honolulu subsequent to the commission of the crime alleged in the indictment, the commission of said crime having been completed in San Francisco and before their arrival in Honolulu.

3. The Court erred in permitting, over objection, leading questions to the prejudice of defendants-appellants' right to a fair and impartial trial.

5. The Court erred in permitting the prosecutrix to remain in the court, although the jury was excluded (while) defendants-appellants made an offer of proof to be elicited on cross-examination of the prosecutrix.

6. The Court erred in unduly limiting the scope and extent of the cross-examination of the prosecutrix

and in unfairly and unfavorably and prejudicially characterizing the cross-examination.

7. The Court erred in refusing to permit defendants-appellants on cross-examination of a government witness to fully inquire into the character and criminal activities of said witness.

8. The Court erred in overruling defendants-appellants' motion for a directed verdict as to defendant Miner Lii.

9. The Court erred in not permitting defendants-appellants to elicit corroboration of testimony contradicting testimony theretofore given by prosecutrix.

10. The Court erred in permitting cross-examination of defendant Alice Lii on matters not referred to in her direct testimony.

11. The Court erred in permitting improper questions of witnesses called in rebuttal.

12. The Court erred in permitting a continuance of the trial in order that the prosecution might produce additional witnesses, and in refusing to permit defendants-appellants to have a reasonable continuance in order to procure a witness whose testimony was made necessary by testimony adduced by the prosecution on its case in rebuttal.

13. The Court erred in permitting on rebuttal evidence of other crimes alleged to have been committed by defendants and not related to the crime alleged in the indictment.

IV.

ARGUMENT.

SPECIFICATION OF ERROR NO. 1.

THE COURT ERRED IN OVERRULING DEFENDANTS' OBJECTION TO TRIAL BY THAT JURY IN FRONT OF WHICH THEY HAD BEEN FOUND GUILTY OF CONTEMPT, FINED AND PLACED IN CUSTODY OF THE UNITED STATES MARSHAL (R. p. 27).

The Court convened on Monday, May 21, 1951, to try the defendants. There were twenty-eight jurors present when defendants entered the courtroom nearly one hour after the Court had convened for their trial. The Court said, "You kept 28 jurors waiting here now for practically an hour. The Court finds you in contempt, each of you, for not being here when your case was called. And I fine you each $50 apiece, and you will be in custody of the Marshal until that fine is paid." (R. p. 26). At page 27 of the record defense counsel clearly indicates his belief that the Court's action was "prejudicial to the defendants' rights to a fair and impartial trial, the Court having found in the presence of the jury the defendants guilty in contempt and assessing a fine and ordering them into the custody of the Marshal. I submit that it interferes with their obtaining a fair and impartial trial." This was, in effect, an objection to trial by a jury selected from this jury panel, was so treated by the Court, and overruled.

It is defendants' contention that they made an honest mistake as to the trial date, and that even though the Court elected to believe otherwise, summary punishment should not have been awarded them

in the presence of the jury. The asperity with which the Court castigated them for their tardiness, the Court's reference to the fact that they had kept the twenty-eight jurors waiting almost an hour and their subsequent fine for contempt and the Court's order placing them in the custody of the marshal made it impossible for defendants to obtain a fair and impartial trial from a group of men who had witnessed these proceedings. Under the circumstances it was the duty of the Court to discharge the jury panel, and its failure so to do deprived the defendants of their rights to trial *by an impartial jury,* and was a violation of the Fifth and Sixth Amendments to the Constitution of the United States.

SPECIFICATION OF ERROR NO. 2.

THE COURT ERRED IN PERMITTING EVIDENCE OF THE ACTION OF THE PROSECUTRIX AND OF THE DEFENDANTS AFTER THEIR ARRIVAL IN HONOLULU SUBSEQUENT TO THE COMMISSION OF THE CRIME ALLEGED IN THE INDICTMENT, THE COMMISSION OF SAID CRIME HAVING BEEN COMPLETED IN SAN FRANCISCO AND BEFORE THEIR ARRIVAL IN HONOLULU (R. pp. 42-46).

At the beginning of Chapter 117—White Slave Traffic, Title 18, § 2421, U.S.C.A., appears a section entitled "Historical and Revision Notes" from which the following language is quoted, "Section consolidates sections 397, 398, 401 and 404 of Title 18, U.S.C., 1940 ed." The word "section" as used in the foregoing, obviously refers to Section 2421 of Title 18, U.S.C.A.

The gravamen of the offense condemned by that paragraph of Section 2421, under which defendants are charged, is the acquisition of a ticket by any person for the use of any female person when such ticket is to be used by her for transportation in interstate commerce to a place for any immoral purpose, and such female is thereby transported in interstate commerce. The crime is therefore complete when the purchaser acquires the ticket with the intent that a female transports herself in interstate commerce to a place for an immoral purpose, and the woman travels on such ticket in interstate commerce. It is therefore respectfully submitted that if the prosecutrix were in fact given a ticket in San Francisco by the defendants, they having the intent that she should use it to travel to Honolulu for the purpose of engaging in prostitution, and that she so used same (all of which the prosecution attempted to prove), then the crime would have been committed as soon as the prosecutrix had used said ticket and had actually begun her trip to Honolulu, it being immaterial whether she ever arrived there or not. It was therefore improper, and highly prejudicial to defendants, to permit testimony tending to show evidence of other crimes with which they are not charged, allegedly committed in Honolulu subsequent to the commission of the offense alleged in the indictment (R. pp. 42-46). Whether or not prosecutrix engaged in prostitution at the defendants' home after arriving in Honolulu is immaterial to the charge.

In the case of *Cholakos v. United States,* 2 F. (2d) 447 (1924), defendant was indicted for an alleged violation of White Slave Traffic Act (Com. St. §§ 8812-8819). In that case the Court considered one of the instructions given by the trial Court and said:

> "In the course of the charge the court said, in substance, that if defendant furnished the girl, when outside of Ohio, the means of transportation into that state, thereby inducing her to make the trip for the purpose charged, it would be immaterial whether the prostitution took place after she reached Ohio. This instruction correctly stated the law. Wilson v. United States, 232 U.S. 563, 570, 34 S. Ct. 347, 58 L. Ed. 728; Rizzo v. United States (C.C.A. 3), 275 F. 51, and cf. Athanasaw v. United States, 227 U.S. 326, 33 S. Ct. 285, 57 L. Ed. 528; Ann. Cas. 1913 E, 911."

In the *Cholakos* case certiorari was denied in 45 S. Ct. 464, 267 U.S. 604, 69 L. Ed. 809.

Since it is clearly the law that when the tickets (or money), supplied by a defendant for the purposes alleged in the indictment, are used by a female for transportation in interstate commerce, the offense is complete, and the subsequent acts of prostitution committed by Sarah Lee Wright in Honolulu are immaterial to the charge and could have been introduced by the prosecution for the sole purpose of prejudicing the jury, and having been properly objected to by the defense, should have been excluded by the Court.

More than that, the Court was without jurisdiction to hear any evidence since this prosecution was not

permitted for the reason that it was not "had in a district in which the offense was committed." (Rule 18, Federal Rules of Criminal Procedure).

SPECIFICATION OF ERROR NO. 3.

THE COURT ERRED IN PERMITTING, OVER OBJECTION, LEADING QUESTIONS TO THE PREJUDICE OF DEFENDANTS-APPELLANTS' RIGHT TO A FAIR AND IMPARTIAL TRIAL (R. pp. 37, 40, 43, 203).

It is respectfully submitted that the testimony of Sarah Lee Wright, the key witness for the prosecution, was adduced on direct examination as the result of leading questions by the prosecutor, improperly allowed over the objections of defense (R. pp. 37, 40, 43). This witness, on direct examination, made one direct quotation of what she said to defendants (R. p. 36) and none of what they said to her, during that period about which she was being questioned. In all relevant phases of her testimony, her answers were suggested by the prosecutor's questions. Similarly, in rebuttal, when the prosecutor wanted to intimate that she was not staying with defendants voluntarily, the Court permits her to answer the question, "Could you leave there by yourself?" (R. p. 203). It is submitted that this last question, together with those objected to at (R. pp. 37, 40, 43), was so suggestive and prejudicial to defendants as to deny them their rights under the Fifth and Sixth Amendments to the Constitution of the United States, and the objections thereto were erroneously overruled by the Court.

58 Am. Jur., Witnesses, § 570: The rule against asking one's own witness leading questions is not an absolute rule of exclusion; on the contrary, the allowance of leading questions on direct examination is within the discretion of the trial judge. Ordinarily, that discretion is to be exercised so as to permit such questions to be put to a witness on his direct examination when he is manifestly hostile to the interest of the party calling him; when there is difficulty in getting direct and intelligible answers by reason of the ignorance of the witness or his unfamiliarity with the English language; when he has exhausted his memory without stating the particular required; when the answers of a witness have taken by surprise the party calling him; when the subject of inquiry is a proper name or other fact which cannot be arrived at by a general inquiry; or when the witness is a child of tender years whose attention cannot be otherwise called to the subject matter, or is of feeble mind, or a deaf mute.

Since the witness Sarah Lee Wright was not shown to be within any of the above named group for whom the Court ordinarily is justified in relaxing the general rule that leading questions are not to be asked on direct examination, it is respectfully submitted that the Court erred in relaxing the rule in her case.

SPECIFICATION OF ERROR NO. 5.

THE COURT ERRED IN PERMITTING THE PROSECUTRIX TO REMAIN IN THE COURT, ALTHOUGH THE JURY WAS EXCLUDED, (WHILE) DEFENDANTS-APPELLANTS MADE AN OFFER OF PROOF TO BE ELICITED ON CROSS-EXAMINATION OF THE PROSECUTRIX (R. p. 52).

It is respectfully submitted that the Court abused its discretion when it overruled defendants-appellants' motion that the witness Sarah Lee Wright be excluded from the Court while defendants-appellants offered to prove that she had practiced prostitution since leaving defendants' home, despite her testimony to the contrary, thus demonstrating her immorality and attacking her general credibility. It is significant, however, that the Court excused the jury on its own motion.

The witness on cross-examination had been hostile, tricky and evasive (R. pp. 7-51). Defendants-appellants offered to prove by cross-examination certain facts which the witness had indicated she did not care to admit. Under the circumstances, it is respectfully submitted that the Court, in allowing her to be forwarned as to subsequent examination, grossly abused its discretion.

> *3 F.R.D. 384*: The exclusion of witnesses from the courtroom is another matter which is left to the discretion of the trial judge, *who should take this step when the presence of witnesses may interfere with a fair trial.* (Italics added.)

The ruling of the Court in this instance deprived defendants-appellants of that most useful weapon of

the cross-examiner, the element of surprise, and gave this extremely hostile witness time in which to prepare herself for the subsequent line of inquiry. Due to this erroneous ruling of the Court the witness was forewarned and to be forewarned is to be forearmed. It is significant that when appellants made an offer of proof when their own witness, Harold John Lewis, was on the stand, that the prosecution elected to have Mr. Lewis excluded from the courtroom.

SPECIFICATION OF ERROR NO. 6.

THE COURT ERRED IN UNDULY LIMITING THE SCOPE AND EXTENT OF THE CROSS-EXAMINATION OF THE PROSECUTRIX AND IN UNFAIRLY AND UNFAVORABLY AND PREJUDICIALLY CHARACTERIZING THE CROSS-EXAMINATION (R. pp. 70, 80, 85).

It is respectfully submitted that the remarks of the Court in reference to cross-examination of prosecution's witness, Sarah Lee Wright, were prejudicial to defendants-appellants and tended to influence the jury against defendants-appellants. At (R. p. 68) the Court said, "Well, now, this is not proper cross-examination"; at (R. pp. 68-69) "You may go ahead with that, but you are going so far afield that it is just simply killing time." (At R. p. 70) the Court said, "Well, now, there are just so many Louises in the world or people of that name that that is not a fair question unless——." At (R. p. 85) the Court said, "Well, there is just so much of this so-called cross-examination that it seems to me it is just a sort

of a fishing excursion. Counsel, I don't feel that it would be proper to give you any more than ten minutes' additional time to finish your cross-examination"; and again at (R. p. 85) when counsel explains that he needs more than ten minutes as he has covered only one phase of the witnesses testimony, the Court answers, "Well, you had better get on another phase, then, if it is of importance to you."

During that portion of the trial covered by the Record pages 68-85, defendants-appellants were attempting to discredit a hostile, strangely forgetful, vague and evasive witness. The Court's interruptions, its insistence on strict cross-examination (R. p. 75), its derogatory remarks in front of the jury, its imposition of a time limitation, all were highly prejudicial to defendants-appellants and were, it is respectfully submitted, error.

> *58 Am. Jur., Witnesses, § 630:* The general Statement of the rule that cross-examination must be confined to the matters which have been stated in the examination in chief has not always been strictly adhered to. * * * Exceptions exist where the questions are asked to show bias or prejudice in the witness, or to lay the foundation to admit evidence of prior contradictory statements. The rule should be liberally construed so as to permit on cross-examination any question which reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, *or to test his accuracy, memory, veracity, character, or credibility.* Moreover, the rule *must*

be relaxed where literal enforcement thereof would only serve to defeat the ends of justice. (Italics added.)

The case of *Conley v. Mervis,* 324 Pa. 577, 188 A 350, 108 A.L.R. 160 (1936), was one in which the defendant-appellant had been denied the right, in the trial Court, of being cross-examined by his counsel after he admitted on the stand that he owned the license plates on the truck which injured plaintiffs-appellees, but denied owning the truck itself. The Court refused to permit the examination on the ground that matters of defense could not be brought out under the guise of cross-examination but must be brought out as part of his own case. In announcing the Pennsylvania Supreme Court's ruling reversing this decision, Chief Justice Kephart said as follows:

"Nothing is better established than that cross-examination in many cases may reach beyond the facts elicited on direct examination and embrace new matter. As early as 1848 Chief Justice Gibson, the creator of the Pennsylvania rule, in Bank v. Fordyce, 9 Pa. 275, at page 277, 49 Am. Dec. 561, said, 'A party is entitled (on cross-examination) to bring out every circumstance relating to a fact which an adverse witness is called to prove.' Or, as the rule is sometimes stated, it is competent on cross-examination to develop all circumstances within the witness' knowledge which qualify or destroy his direct testimony, although, strictly speaking, they constitute new matter and are part of the cross

examiner's own case." Felski v. Zeidman, 281 Pa. 419, 126 A. 794; Quigley v. Thompson, 211 Pa. 107, 60 A. 506; Jackson v. Litch, 62 Pa. 451.

In the case of *Hopkins v. State,* 130 Pac. 1101 (Okla. 1913) at page 1104, a murder case, the Court states the following as the rule for the permissible limits of cross-examination:

> As to what is the proper practice on cross-examination of witnesses the general rule is that the party cross-examining should be confined to the matters concerning which the witness has been examined in chief; but this rule should be liberally construed so as to permit any questions to be asked on cross-examination reasonably tends to explain, contradict, or discredit any testimony given by the witness in chief, or to test his accuracy, memory, veracity, character, or credibility * * *.

It is submitted that this latter citation is a true statement of the law; that the Court's characterization of questions as unfair (R. p. 68), its insistence on strict cross-examination (R. p. 75), its description of defendants-appellants' cross-examination as "so-called" (R. p. 85), and its limiting defendants-appellants remaining cross-examination of Sara Lee Wright to ten minutes (R. p. 85), were so prejudicial to defendants-appellants as to deny them a trial by an impartial jury as guaranteed by the 6th Amendment to the Constitution of the United States.

SPECIFICATION OF ERROR NO. 7.

THE COURT ERRED IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS ON CROSS-EXAMINATION OF A GOVERNMENT WITNESS TO FULLY INQUIRE INTO THE CHARACTER AND CRIMINAL ACTIVITIES OF SAID WITNESS (R. pp. 80, 85, 86, 218).

It is respectfully submitted that it was an abuse of discretion for the Court to restrict defendants-appellants' remaining cross-examination to ten minutes at a time when defendants-appellants were seeking to prove the bad character and previous criminal background of the witness, Sarah Lee Wright (R. p. 85), and that it was further error (regardless of whether or not the Court intended to so limit the time for defendants-appellants to finish cross-examination) to again indicate that cross-examination was to be so limited by its subsequent remarks, "Well, you had better get on another phase, then, if it is of importance to you," (R. p. 85), and, "Well, you had better proceed with your cross-examination."

At this stage of the cross-examination defendants-appellants were attempting to impeach the witness by showing that she had been a prostitute while in the continental United States, a fact previously denied (R. p. 80); by attempting to show by the circumstances surrounding her trip to Maui that she had gone there for the purpose of prostitution (R. p. 81); by attempting to get the witness to elaborate on the circumstances of her arrest, and confession of prostitution to the Maui police (R. p. 82), and, later, by attempting to show her affair with a man who is presumably married (R. p. 218). All of these matters,

and those which defendants-appellants sought to adduce after the Court put a time limit on subsequent cross-examination, went to the witness' credibility, occupation, social connections, manner and place of living, and other relevant matters.

> 58 *Am. Jur., Witnesses,* §674: The impeachment of a witness embraces all means having the purpose and tendency to impair his credit. It involves proof of matters affecting the general credit of a witness as well as those affecting his credit in the particular case.

> 58 *Am. Jur., Witnesses,* §691: By the great weight of authority it is permissible upon cross-examination to inquire into the antecedents of a witness by showing his occupation, social connections, manner and place of living, and the like. Being matters largely of his own choice, they indicate his true character. He is, therefore, responsible for them, and they may be inquired into for the purpose of affecting his credibility. This is useful in enabling the court or jury to comprehend just what sort of person they are called upon to believe. Viberg v. State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22; People v. Bond, 281 Ill. 490, 118 NE 14, 1 ALR 1397; Cochran v. United States, 157 US 286, 39 L ed. 704, 15 S.Ct. 628; Sawyer v. United States (CCA 9th) 27 F. 2d 569 (writ of certiorari denied in 278 US 650, 73 L ed. 562, 49 S.Ct. 96) citing RCL; Paxton v. State, 114 Ark. 393, 170 SW 80, Ann. Cas. 1916 A 1239; State v. Fong Loon, 29 Idaho 248, 158 P. 233, LRA 1916 F 1198; Wilbur v. Flood, 16 Mich. 40, 93 Am. Dec. 203.

Who can say what might have been developed by a more comprehensive cross-examination of this hostile and evasive witness, had same not been curtailed by the Court? Since the appellants' defense, due to the circumstances and nature of the charge, depended almost entirely on the results of the cross-examination of the prosecutrix, it is submitted that the Court erred in not allowing the defense to go fully into the witness, Sarah Lee Wright's, character and criminal activities.

SPECIFICATION OF ERROR NO. 8.

THE COURT ERRED IN OVERRULING DEFENDANTS-APPELLANTS' MOTION FOR A DIRECTED VERDICT AS TO DEFENDANT MINER LII (R. p. 128).

It is respectfully submitted that at the time defendants-appellants moved for a directed verdict as to defendant Miner Lii, the salient points of direct testimony of the prosecutrix, Sarah Lee Wright, whether credible or not were, in so far as Miner Lii was concerned, as follows:

(1) Witness met defendants in October of 1950 in San Francisco (R. p. 34).

(2) Witness and defendants talked in a car outside the bar where she had met them (R. p. 35).

(3) *They* asked her if she wanted to come to Honolulu to work—and she concludes that "work" meant prostitution, it was the "understanding" between them (R. p. 36). (This is the witness who de-

nies ever having been a prostitute before coming to Honolulu) (R. pp. 217, 221).

(4) They told her what everything was going to be like (R. p. 36).

(5) Witness told them she would let them know (R. p. 37).

(6) The third day after the first meeting witness "let them know for sure if I was coming or not" (R. p. 38).

(7) "Well, both of them knew I (witness) was coming (R. p. 38).

(8) The witness heard defendant Alice Lii make three reservations on Pan-American, one of which was for the use of the witness (R. p. 40).

(9) When witness first talked to them, he (presumably Miner Lii or Junior Sampson) (R. p. 90) said he'd pay her way (R. p. 41).

(10) Witness, the Liis and Mary Chang left for Honolulu by plane, Monday morning.

We submit that no other testimony adduced by direct examination was properly before the Court at the time the motion for a directed verdict was made (Assignment No. 11).

On cross-examination the witness, Sarah Lee Wright, added the following significant testimony to that adduced by her direct examination:

> "It is the same time I told them I was broke and that I couldn't go, the only reason I couldn't

> go; and *they* said, that was quite all right, *they'd* buy my ticket" (R. p. 91) * * * and * * * *"They* called up and got my ticket, and *they* went down and picked it up. *I wasn't with them then"*. (R. p. 96).

The witness Edward George Valazquez's testimony was to the effect that he was the senior cashier of Pan-American Airways in San Francisco; that on October 7 tickets bearing consecutive numbers were issued by Pan-American to the Liis and Sarah Lee Wright.

The witness Frank Sampson testified he knew the defendants and prosecutrix, had been with them in San Francisco and had driven the Liis, Sarah Lee Wright and Mary Chang to the airport the day they left for Honolulu, and that he had seen Sarah Lee Wright at the Liis when he, the witness, visited the Liis for three weeks subsequent to the San Francisco encounter. On cross-examination he admitted living with Sarah Lee Wright for sometime in Honolulu, after the visit with the Liis.

It is submitted that a prima facie case had not been made against defendant Miner Lii at this point. He is charged with obtaining a ticket to be used by Sarah Lee Wright to travel in interstate commerce to a place for immoral purposes, and that she so used the ticket for such purposes. There is not one iota of evidence tending to prove that Miner Lii procured or obtained a ticket from Pan-American Airways for Sarah Lee Wright's use. There is testimony that de-

fendant Alice Lii made a phone call to reserve a ticket for Sarah Lee Wright, but if this be a crime, the charge is not conspiracy, and the criminal act, if any, of Alice Lii is not imputable to her husband. All through Sarah Lee Wright's testimony, she says *"they said"* so that it is impossible to tell who said what. At the time the motion in question was made there was nothing properly before the Court except prosecutrix' testimony that *either* Alice Lii or Miner Lii had asked her to come to Honolulu to work as a prostitute, that Alice Lii allegedly phoned for a plane ticket for Sarah Lee Wright, that tickets for the Liis and prosecutrix were purchased by someone on October 7th, and that Sarah Lee Wright left with the Liis for Honolulu. Under these circumstances the Court erred in denying defendants-appellants' motion for a directed verdict as to Miner Lii.

And, this is further true for the reason that from the evidence before the Court the crime alleged in the indictment was committed and completed in San Francisco and under Rule 18 of the Federal Rules of Criminal Procedure the prosecution could not be had in the district of Hawaii since San Francisco is not in that district, Hawaii being a separate and distinct district under the provisions of Section 19, Title 28, U.S.C.A. 12, c. 139, Sec. 64a, 63 Stat. 99.

SPECIFICATION OF ERROR NO. 9.

THE COURT ERRED IN NOT PERMITTING DEFENDANTS-APPELLANTS TO ELICIT CORROBORATION OF TESTIMONY CONTRADICTING TESTIMONY THERETOFORE GIVEN BY PROSECUTRIX (R. pp. 137, 139).

Sarah Lee Wright testified unequivocally that she had never been to the Island of Kauai (R. p. 71). Defendants-appellants' witness, Harold John Lewis, testified that he had seen Sarah Lee Wright sometime after September but before December (R. p. 132). After extensive cross-examination intended to cast doubt on witness' identification of Sarah Lee Wright, defendants-appellants tried to show the circumstances under which the witness had subsequently seen the prosecutrix in Honolulu, a fact brought out on cross-examination, in an effort to make the identification more certain (R. p. 137). The Court upheld the prosecution's objection to the inquiry. Defendants-appellants then offered to prove that the witness Lewis had identified Sarah Lee Wright from photographs, after seeing her on Kauai. The offer was denied by the Court (R. p. 139).

It is respectfully submitted that the Court erred in these rulings. Defendants-appellants may have had an opportunity, at this stage of trial, to show that prosecutrix had knowingly and deliberately lied under oath about this particular circumstance. Had that been shown to their satisfaction, it would have greatly affected the weight to be given her entire testimony. Her credit with the jury would have been entirely destroyed and an acquittal might have resulted. The

ruling of the Court, in effect, wrongfully denied defendants-appellants of their one clear chance to discredit this tricky and malicious witness.

> 58 *Am. Jur., Witnesses,* §675: "In general, it may be said that the credibility of a witness may be attacked by the testimony of other witnesses that the facts about which he has testified are otherwise than he has stated, * * *"

We submit that the verdict of the jury is evidence that they were not completely satisfied with the identification of witness Lewis of Sarah Lee Wright as the girl he saw on Kauai. Under the circumstances it was the absolute duty of the Court to allow defendants-appellants to use any proper means to convince the jury that the witness had cogent reasons for being certain in his identification.

SPECIFICATION OF ERROR NO. 10.

THE COURT ERRED IN PERMITTING CROSS-EXAMINATION OF DEFENDANT ALICE LII ON MATTERS NOT REFERRED TO IN HER DIRECT TESTIMONY (R. pp. 167, 170, 186, 187).

It is respectfully submitted that the prosecution's questions which showed that the Liis lived together as husband and wife after their divorce in 1948, and were not remarried until after the return of the indictment herein, were outside the scope of her direct examination and improperly admitted by the Court (R. p. 167). Further, it is submitted that the questions by the prosecution regarding the ownership by

Mrs. Lii of certain automobiles was also improperly admitted for the same reason (R. p. 170).

> "In criminal cases the cross-examination of witnesses must be confined to the subject matter of the direct or to that closely connected therewith." *State v. Wright,* 40 La. Ann. 589; *State v. Baker,* 43 La. Ann. 1168.

Grigsby v. Commonwealth the Court said:

> "But the fact that the accused becomes a witness in his own behalf does not waive his right to object to procuring from him on cross-examination incompetent or inadmissible evidence." 299 Ky. 721, 187 S.W. (2d) 250, 159 A.L.R. 196 (citing *Roberts v. Commonwealth,* 198 Ky. 838, 250 S.W. 115).

It is further submitted that the prosecution's questions to Mrs. Lii as to her arrest and conviction for interference with a police officer (R. pp. 186-187) were improperly admitted over objection. The transcript indicates (R. p. 190) that the conviction was appealed and further (R. p. 191), that this was a District Court conviction. In *Matsumoto v. Toraichi,* 30 Haw. 468 (1928), the Court says, at page 470, "It has been definitely held that upon general appeal (from district court to the circuit court) a trial *de novo* is required." *Associated Repair Works v. Rogers,* 22 Haw. 91, 95 (1914); *Bell v. Palea,* 13 Haw. 278, 281 (1901); *Jardin v. Madeiros,* 9 Haw. 503 (1894).

SPECIFICATION OF ERROR NO. 11.

THE COURT ERRED IN PERMITTING IMPROPER QUESTIONS OF WITNESSES CALLED IN REBUTTAL (R. pp. 197-203, 232-248).

It is respectfully submitted that the "so-called" rebuttal testimony of the witness Sarah Lee Wright was adduced by improper questions and that there is error on every page (R. pp. 197-203) except p. 202 where it was cured by the Court.

Here the prosecution asks the witness Sarah Lee Wright about matters which she had testified to on its case in chief (R. pp. 197-198). From Record pp. 198-203 the prosecution goes into details of her alleged prostitution while at the Liis, her earnings and other irrelevant matters, all of which is improper rebuttal. Any evidence as to the actions of Sarah Lee Wright or of the defendants-appellants after their arrival in Honolulu is inadmissible as having no relevancy to the offense charged. Assignment XI supra.

> "Rebutting evidence is evidence in denial of some affirmative case or fact which defendant has attempted to prove." *Carver v. United States,* 160 U.S. 553, 40 L. ed. 532, 16 S. Ct. 388.

The defendants-appellants have not tried to prove that Sarah Lee Wright was not a prostitute, nor that she was not in their home for some seven weeks, nor have they tried to prove as an affirmative fact any other matter to which she testified at this time. It is respectfully submitted that it was error, an error which was highly prejudicial to defendants-appellants, to allow this testimony of the prosecutrix (R.

pp. 197-203) to be adduced under the guise of rebuttal.

> *20 Am. Jur. Evidence § 277*: Rebutting evidence is evidence in denial of some affirmative case or fact which the adverse party has attempted to prove. Such evidence should be limited to matters of rebuttal.

As to the testimony of the two car salesmen (R. pp. 232-248), it is submitted that the Court erred in admitting their testimony in under the guise of rebuttal. Possibly their testimony might have been admissible for some other purposes but it was improperly admitted as rebuttal since it was not in "denial of an affirmative fact" which defendants-appellants had tried to prove.

SPECIFICATION OF ERROR NO. 12.

THE COURT ERRED IN PERMITTING A CONTINUANCE OF THE TRIAL IN ORDER THAT THE PROSECUTION MIGHT PRODUCE ADDITIONAL WITNESSES, AND IN REFUSING TO PERMIT DEFENDANTS-APPELLANTS TO HAVE A REASONABLE CONTINUANCE IN ORDER TO PROCURE A WITNESS WHOSE TESTIMONY WAS MADE NECESSARY BY TESTIMONY ADDUCED BY THE PROSECUTION ON ITS CASE IN REBUTTAL (R. pp. 232, 272).

It is respectfully submitted that the Court abused its discretion in not granting defendants-appellants' motion for a week's continuance in order to procure a witness from the coast, particularly so when her voluntary presence at the trial was reasonably ex-

pected by defendants-appellants until the previous evening when she failed to arrive as scheduled (R. pp. 229-230), and even more particularly so since her presence was made essential by the adduction of additional testimony from prosecutrix under the guise of rebuttal, less than one-half hour before the motion was made.

It is acknowledged that whether or not a continuance will be granted is within the sound discretion of the Court. However, on the closing day of the trial the prosecution is allowed to put on improper rebuttal testimony (R. pp. 197-203), is granted a continuance, then (R. p. 272) the defendants-appellants are denied a motion for a reasonable continuance to secure a witness, one Mary Chang, to answer testimony impossible to anticipate and adduced that very day.

The name of Mary Chang appears all through the record and it is obvious that she possesses full knowledge of the transactions between the Liis, the prosecutrix, and herself. Under these circumstances, we respectfully submit that it was error for the Court to refuse a motion for a reasonable continuance to allow defendants-appellants to procure their major witness, Mary Chang.

SPECIFICATION OF ERROR NO. 13.

THE COURT ERRED IN PERMITTING ON REBUTTAL EVIDENCE OF OTHER CRIMES ALLEGED TO HAVE BEEN COMMITTED BY DEFENDANTS AND NOT RELATED TO THE CRIME ALLEGED IN THE INDICTMENT (R. pp. 249-267).

It is respectfully submitted that the Court erred in admitting any of the testimony of witness Lorraine Marjorie Staunton as rebuttal, or for any other reason (R. pp. 249-267).

To be admissible as rebuttal, testimony must tend to contradict an affirmative fact that defendants-appellants have attempted to prove affirmatively (Specification of Error No. 11, supra). There is not one fact in her entire testimony the contrary of which defendants-appellants have tried to prove affirmatively.

Further, her evidence is not properly admissible in any event as it does not tend to prove or disprove any of the facts in issue in this case.

> *20 Am. Jur., Evidence, § 302:* The fundamental principle is that evidence must be relevant to the facts in issue in the case on trial and tend to prove or disprove such facts; evidence as to collateral facts is not admissible. Accordingly, as a general rule, evidence of other acts, even of a similar nature, of the party whose own act or conduct or that of his agents and employees is in question, or other similar transactions with which he has been connected, of a former course of dealing, of his conduct or that of his agents and employees on other occasions, or of his particular conduct upon a given occasion is not competent to prove the commission of a particular

act charged against him, unless the acts are connected in some special way, indicating a relevancy beyond mere similarity in certain particulars.

V.

CONCLUSION.

It is respectfully submitted that each error relied on is sufficient in itself to entitle the appellants to have the jury's verdict set aside.

Dated, Honolulu, Hawaii,
November 5, 1951.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellants.